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Nos. 510 and 511

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

On Appeal From The United States District Court for the Eastern District of Michigan, Southern Division

REPLY OF APPELLANTS BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES AND RAILWAY LABOR EXECUTIVES' ASSOCIATION TO MOTIONS TO AFFIRM

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THE WEST TOLEDO PUBLISHING CO., INC.

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Appellees' arguments in support of the motions to affirm which have been filed herein were for the most part anticipated and dealt with in our jurisdictional statement, making superfluous any further extended argument at this time on

the issues presented by the appeal. However, the remarkable reversal of position by the United States, whose answer filed in the court below confessed error on the part of the Interstate Commerce Commission and prayed that the Commission's order be set aside, and which had strongly supported, in brief and oral argument, the principal contentions of these appellants, compels us to file this brief reply. We shall accordingly discuss first, the bearing upon this appeal of the position now taken by the United States, in the light of its stipulation with the carrier appellees herein, and will then comment very briefly on appellees' contentions in support of the motions to affirm.

POSITION OF THE UNITED STATES

Under date of September 30, 1963, the date of the filing of our jurisdictional statement herein, the United States and the carrier appellees herein entered into a stipulation, in the proceedings before the Commission in its Finance Docket No. 21160, which appellees rely upon as mooting the contention that the Commission failed to give adequate consideration to the competitive effects on other rail carriers of the C. & O. - B. & O. affiliation. The stipulation was entered into without any knowledge on the part of these appellants, or any advance notice to or service upon them. It is represented as affording ample protection to all concerned against any adverse competitive effects upon other railroads, and hence obviating any need for investigation and consideration by the Commission as to what those effects might be.

In this appeal the United States, without adverting to the stipulation, has now filed a most unusual "Memoran-

dum" which "advises the Court that it no longer seeks a remand of this case to the Commission." Its explanation of this reversal of position is simply that on the basis of an independent study conducted by an Interagency Committee on Transport Mergers for the purpose of formulating a merger policy for the Executive Branch, the United States had concluded that acquisition of control of the B. & O. by the C. & O. would be in the public interest, and that the withdrawal of its previous challenge herein to the validity of the Commission's order was occasioned by "its conclusions as to the ultimate merits of the merger proposal." It is significant that the Memorandum nowhere recites any change of position by the United States with respect to the *validity* of the Commission's order, but merely announces withdrawal of opposition to it.

We submit that the withdrawal of Government opposition to the Commission's order no more supports its validity than did the lack or withdrawal of carrier opposition to the proposal before the Commission relieve it of its statutory obligations. In this connection, the following concluding paragraph of the argument in the reply brief filed by the United States in the court below is particularly relevant:

> "As we pointed out in our Main Brief (pp. 28-29), the inadequacy of the Commission's findings on these points is apparently due to the failure of other carriers to raise them. But we repeat (Main Brief, pp. 17-21) that regardless of the inaction of private parties the Commission may not approve a proposed Section 5 transaction unless it finds the proposal to be consistent with the public interest. And the relevance of the considerations which enter into a public interest determination — spelled out in Section 5 and in the governing Supreme Court decisions — is simi-

larly independent of the conduct of private parties. 'The Commerce Act is the measure of the Commission's responsibilities.'"

The silence of the Memorandum filed herein by the United States, with respect to the basic issue on this appeal —the validity of the Commission's order—speaks eloquently of its reluctance to support the legal propositions urged by the other appellees in support of the motions to affirm.

The "stipulation" entered into between the United States and the carrier appellees (Appendix "A" to carrier appellees' Motion to Affirm) is completely illusory. Aside from the fact that the law requires the Commission to make adequate findings, based on substantial evidence, with respect to the transaction's competitive implications for other carriers *in advance* of approval thereof, the stipulation in question does not and could not afford protection against the future competitive impact that may flow from the C. & O.-B. & O. affiliation. First of all, it is apparent from a careful analysis of its wording that the stipulation provides that the Commission "may" enter a supplemental order to cope with future "undue" traffic diversions that may occur, only "upon application by the United States Department of Justice", and that only "in such event" would other interested parties have a right to be heard by the Commission. And secondly, it is apparent upon consideration of the principal factors that would occasion adverse competitive effects on other carriers — availability of better routes, upgraded equipment, improved terminal facilities, better car supply, more efficient service to shippers — that no "conditions" which the Commission might legally or practicably impose could shelter other carriers from the impact of the C. & O.-B. & O. affiliation. It would have no

authority, even were it so inclined, to require withdrawal by the appellee carriers of benefits of this sort to the shipping and traveling public.

The need for a plenary review herein by this Court is emphasized by the position of the United States. Congress placed in the hands of the Commission the safeguarding of the public interest in transactions of this sort, and imposed certain standards, both substantive and procedural, to be complied with by the Commission in the performance of its function. The net effect of the contentions of appellees, viewed in the light of the foregoing stipulation and the Memorandum filed by the United States, would be to transfer to the Executive Branch of the Government, operating through its Interagency Committee on Transport Mergers, the function of independently determining, without hearing or participation by other parties, the substantive merits of railroad acquisitions or mergers, and to place largely within the discretion of the Department of Justice the weighing of such determinations against the other public interest factors which Congress intended the Commission to consider and pass upon. The prospect of such a clear thwarting of the legislative purpose, in a case of this magnitude, demands plenary consideration by this Court.

OTHER CONTENTIONS OF APPELLEES IN SUPPORT OF MOTIONS TO AFFIRM

Aside from the effect which they seek to ascribe to the change in position by the United States, the Commission and the carrier appellees attempt to support their respective motions to affirm by arguments which were dealt with in our jurisdictional statement. In general, they resist a

plenary review by this Court on the basis that this is "merely" a case involving adequacy of findings and supporting evidence, disregarding the obvious magnitude and impact of the transaction involved, and the fact that in almost *any* court review of a Commission decision the central issues will inevitably relate to adequacy of findings and substantiality of evidence. Discussion of the requirements of the Administrative Procedure Act, and its impact upon standards of review of Commission action, is notably absent from appellees' arguments. Heavy reliance is placed upon the right of the Commission to resort to its presumed "expertise", unaided by discussion or exposition of the factors entering into its determinations. And their arguments, particularly that of the Commission, repeatedly cite the *absence* of evidence before the Commission as to adverse competitive effects upon other carriers, and the lack of opposition by other railroads to the proposed transaction, as factors supporting the validity of the order which is the subject of this action.

These arguments, as well as appellees' reliance upon the Government's change of position, point up what we submit is one of the most important questions confronting this Court — whether the Commission is charged under the statutes with the duty to approve transactions as consistent with the public interest only after receiving substantial evidence and entering adequate findings on the factors to which the law requires it to give consideration, or whether it may infer such consistency on the basis of the absence of introduction of evidence relating to those factors by the parties to the Commission proceedings.

Here, as in the court below, appellees have deliberately

misconstrued the thrust of a number of the arguments set forth in our jurisdictional statement. For example, we did not contend that the Commission had to technically consolidate this case with other pending merger transactions, or formulate a master plan for the Eastern railroad system, but only that it had to consider the transactions in the light of each other, and make appropriate findings here based upon consideration of railroad realignments resulting from the other cases. And we did not contend that the Commission had to make precise mathematical determinations with respect to potential traffic diversion, but did and do assert that it was obliged to couch its findings in terms more meaningful than such conclusory language as "undue".

The unsubstantiality of the testimony of shipper witnesses and officials of the appellee carriers, with respect to potential traffic diversion, was pointed out in our jurisdictional statement. The fallacy of appellees' attempt to attribute significance to the lack of opposition or evidence by other carriers, with respect to the factor of traffic diversion, was extensively demonstrated by Commissioner Tucker in that portion of his dissent commencing at 317 I.C.C. 326.

We submit that the viewpoint of the Commission and the court below with respect to the nature and scope of the inquiry to be made in transactions of this sort, converting a Section 5 (2) case into substantially an adversary proceeding, if adopted, would completely emasculate the statutory requirement that findings be based on substantial evidence. And approval of the Commission's so-called "findings" herein would obviate any need for findings more adequate than the mere recitation of compliance with statutory requirements. In the light of the multitude of pending rail-

road merger proposals, the substantiality of the questions here involved, and the pressing need for their determination by this Court, are overwhelmingly apparent.

CONCLUSION

For the foregoing reasons, it is submitted that the questions presented by this appeal are substantial and of such importance as to warrant plenary consideration by this Court, and that the motions of appellees to affirm the judgment of the District Court should be denied.

Respectfully submitted,

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